In The

Supreme Court of the United States

October Term, 1961

No. 25

James R. Carter, *Petitioner*

vs.

United States of America, *Respondent*

Joe S. Floyd, *Petitioner*

vs.

United States of America, *Respondent*

James M. Hicks, *Petitioner*

vs.

United States of America, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Curtis P. Mitchell
John A. Shorter, Jr.
Counsel for Petitioners
508 Fifth Street, N.W.
Washington, D. C.

Federal Law Publishing Co., 508 Fifth St., N.W., Washington, D.C.

INDEX

Subject Index

	Page
PETITION FOR WRIT OF CERTIORARI	1
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED	3
United States Constitution:	
Fourth Amendment	3
Fifth Amendment	3
Statutes Involved:	
Title 22, Sections 1501, 1502, 1505 D.C. Code	4
Rules Involved:	
Federal Rules of Criminal Procedure, 8, 13, 14, 41	5
STATEMENT OF THE CASE	7
REASONS FOR ALLOWING THE WRIT	13
ARGUMENT	13
CONCLUSION	19

Table of Cases

Berra v. *United States*, 351 U.S. 134	18
Brinegar v. *United States*, 338 U.S. 160	15
Bulman v. *United States*, (1938), 7 Cir. 94 F 2d 197	18
Delli Paoli v. *United States* (1957), 352 U.S. 232	14
Duncan v. *United States* (1928), 7 Cir. 23 F 2d 3, 4	18
Ezzard v. *United States*, (1952), 8 Cir. 7 F 2d 808, 811	18
Gaviers v. *United States*, 220 U.S. 337, 58 L. Ed.	18
Gaynor v. *United States*, (1957), 101 U.S. App. D.C. 177	13
Gaynor v. *United States*, 34 F 2d 12	18

Hopt v. *Utah* (1887) 120 U.S. 430
Lurding v. *United States*, (1950), 6 Cir.
McAdams v. *United States*, (1934), 8 Cir. 74 F 2d 37
Minker v. *United States*, 3 Cir. 85 F 2d 425
Nigro v. *United States*, 8 Cir. 1941, 117 F 2d
Opper v. *United States*, (1954), 348 U.S. 84
Payton v. *United States*, (1955), 222 F 2d 794
Plummer v. *United States*, 189 F 2d 19
State v. *Bryant* 97 S.E. 2d 266
Spies v. *United States*, 317 U.S. 492, 87 L. Ed. 419
179 F 2d 419, 422
United States v. *Di Re*, 332 U.S. 581
United States v. *Hall*, 1950, 173 F 2d 853
United States v. *Toner*, 1949, 173 F 2d 140
Ward v. *United States*, (3rd Cir. 1938) 96 F 2d 189
Weeks v. *United States*, 232 U.S. 383

APPENDIX

Appendix A
Appendix B

Page
14

IN THE

Supreme Court of the United States

18 OCTOBER TERM, 1961

13

13 **No.**

14

13 ———

18 JAMES R. CARTER, *Petitioner*

17, 18 vs.

UNITED STATES OF AMERICA, *Respondent*

18

18 ———

15 JOE S. FLUDD, *Petitioner*

13 vs.

13 UNITED STATES OF AMERICA, *Respondent*

17 ———

15 JAMES M. HICKS, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

21 ———

24

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

———

TO: The Honorable, The Chief Justice of the United States and Honorable Associate Justices of the Supreme Court of the United States.

The Petitioners respectfully pray that a Writ of Certiorari issue to review the judgement of the United States Court of Appeals for the District of Columbia Circuit entered on the 30th day of June, 1960, affirming a judgment of conviction against them heretofore entered in the Trial Court.

OPINION BELOW

The opinion of the United States Court of Appeals is not yet reported, but is known as numbers 15,627; 15,628; and 15,629; consolidated in that Court, and was rendered on the 30th day of June, 1960. The opinion of the lower appellate Court is set forth in the Certified transcript of record submitted herewith. The opinion and judgment are also set forth in appendix (a) and (b) hereof.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit for which review is being sought is dated the 30th day of June, 1960. On the 1st day of August, 1960, Associate Justice Hugo L. Black entered an order extending the time to file Petition for Writ of Certiorari herein to and insluding August 20, 1960. The jurisdiction of this Court is invoked under Section 1254 of Title 28 of the United States Code and Rule 37 (b) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

I

Whether the petitioners' constitutional rights to due process and to a fair trial were violated when a government witness, who was an experienced police officer, unnecessarily stated from the witness stand, in the hearing and presence of the jury, that a co-defendant (who was not on trial) had pleaded guilty earlier to the principal offense charged in the indictment.

II

Does probable cause under the Fourth Amendment of the United States Constitution exist for the arrest of persons who enter a licensed public establishment because prior to their entry, police officers in the execution of a search warrant for the violation of the lottery laws, had

discovered certain numbers paraphernalia concealed in a portion of the premises and had also discovered some numbers material on the person of the licensee, who was present in the premises when the police arrived.

III

Did the trial Court's instruction regarding that part of Section 22-1501 of the District of Columbia Code, which makes the possession of numbers material prima facia evidence of a violation of the Section, violate the petitioners' constitutional right to due process because the said instruction imposed a burden of proof on the petitioners that they were not required to carry; and because it gave the evidence a force and effect that it did not possess.

CONSTITUTIONAL PROVISION, STATUTES, AND RULES INVOLVED

PROVISIONS OF THE UNITED STATES CONSTITUTION:

Fourth Amendment:

The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment:

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,

liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

PROVISIONS OF THE DISTRICT OF COLUMBIA CODE, 1951 ED. (as amended):

SECTION 22—1501. Lotteries—Promotion—Sale of Possession of Tickets.

If any persons shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell on transfer any chance, or right, or interest, tangible, in any policy, lottery, or any lottery, or shall sell for transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy transfer, or have in possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than $1,000.00, or be imprisoned not more than three years, or both. The possession of any copy of record of any such chance, right, token, or other device shall be prima facie evidence that the possessor of such copy of record did, at the time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery.

Section 22-1502. Possession of Lottery or policy tickets.

If any person shall, within the District of Columbia knowingly have in his possession or under his control any record, notation receipt, ticket, certificate, bill, slip, token, paper or writing, current or not current, used or to be used in

violating the provisions of Section 863, 865 or 896 of this Act, he shall, upon conviction of each such offense, be fined not more than $1,000.00 or be imprisoned for not more than one year, or both. For the purpose of this section, possession of any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing shall be presumed to be knowing possession thereof.

Section 22-1505. Permitting table or device to be set up.

(a) Any house, building, vessel, shed, booth, shelter, vehicle, enclosure, room, lot, or other premises in the District of Columbia, used or to be used in violating the provisions of section 863 or 865 of this Act, shall be deemed "Gambling premises" for the purpose of this section.

(b) It shall be unlawful for any person in the District of Columbia knowingly, as owner, lessee, agent, employee, operator, occupant, or otherwise, to maintain or aid or permit the maintaining of any gambling premises.

FEDERAL RULES CRIMINAL PROCEDURE:

RULE 8, Joinder of Offenses and Defendants

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 13. Trial Together of Indictments or Informations.

The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

RULE 14, Relief from Prejudicial Joinder.

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

RULE 41, Search and Seizure

. . . . . .

(e) Motion for return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to unlawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court

in its discretion may entertain the motion at the trial or hearing.

STATEMENT OF THE CASE

The three petitioners before this Court were charged along with one Yancy Peterson and one Phillip Fludd in a seven count indictment with violations of the District of Columbia lottery laws. (Title 22, Sections 1501, 1502 and 1505 of the District of Columbia Code, 1951 Edition, as amended). The only Count of the indictment which was common to all of the defendants below was Count One thereof, which concerned itself with the charge of the operation of a lottery.

The petitioners were arrested with many other persons, by police officers of the District of Columbia on September 26, 1958 in the basement of premises 2023 Benning Road, N. E. The premises was a licensed shoe shine parlor-variety store.

A United States Commissioner's search warrant had previously been obtained for the premises together with three arrest warrants. These warrants were issued on the basis of an affidavit sworn to by Officers Jack Evans and Tarver J. Thomas, Jr. None of the arrest warrants concerned any of the petitioners.

The sufficiency and legality of the search warrant including the legality of its execution as well as the legality of the arrests of the petitioners was challenged in some measure prior to trial and quite fully on oral motions made during the course of the trial. The motions were denied at all stages.

The Government in putting on its case for the prosecution, called as its first witness, Officer Tarver J. Thomas, Jr., of the Gambling Squad of the Metropolitan Police Department. He testified that he was assigned to investigate a complaint concerning gambling activities at 2023 Benning Road, N. E., and that as a result, he began making

observations of the premises on September 2, 1958. He watched the premises again on September 3, 16, 22, 23, and 24, 1958. During these observations he saw people entering the basement of the premises and leaving after a few minutes. During his observations, he saw the petitioner, Carter about the place and the defendant, Phillip Fludd. He also saw a person named Yancy Peterson (reputed to have been a numbers pickup man) enter with bulging pockets on a couple of occasions and leave after about five minutes without the bulge. He also saw a person named Allen Morris (known to him as a numbers man) enter the premises with bulging pockets several times. Significantly, he never saw the petitioners, Joe Fludd or James Hicks during the period of his observations. Afterwards, the officer secured a search warrant for the premises and arrest warrants for Peterson, Morris, and Phillip Fludd.

Officer Robert G. Kissner testified at the trial that he went to premises 2023 Benning Road, N. E., on September 26, 1958, in the company of other officers for the purpose of executing the search and arrest warrants; that upon arrival, at the rear of the premises, he observed that the back door was open; they entered the premises through the open door; that as he entered, he observed the petitioner, Carter, standing near the doorway of the storage room; that he immediately arrested Carter and searched him and took from his person alleged number slips, cards, some money and a note book. That later Government Exhibit numbered three (numbers material) was found inside a drawer of the desk which was near where Carter had been standing when the officers entered;[1] that while they (the officers) were in the premises many persons were arrested; that to his knowledge, only two persons were not arrested.

Officer Ward C. Foulkes, who was in the raiding party, testified concerning the arrest of the petitioner, Hicks. He

[1] "Lottery" materials were also found in the pocket of a coat on the premises and in some trash.

said that Hicks entered the rear of the premises by the back door at or about 3:00 P.M.; that he then arrested and searched him, and obtained from his left sock Government's Exhibit numbered four and five (lottery materials).

Lieutenant William G. Foran (who commanded the raiding party) testified: that he and several other officers at or about 2:30 P.M. on September 26, 1958, entered the rear part of the basement of 2023 Benning Road, N. E., through an open door; that before entering, he announced that they were the police and had a search warrant but he admitted that they did not wait to be admitted; that Carter was arrested immediately upon their entry; that he arrested the petitioner Joe Fludd as he entered the premises by the rear door; that he took from his person Government's Exhibit number eight ($140.41 in money) and some lottery materials.

The records in this cause show that Peterson was indicted along with these petitioners, as was Phillip Fludd; but Allen Morris was not. Phillip Fludd was acquitted at the trial by the Jury on Count Seven and the remaining charges against him were dismissed by the Government. Yancy Peterson had pleaded guilty prior to the time of the trial of these petitioners in the Court below.

In the course of the Government's case, Officer James B. Mills was called as a witness by the Government. He had been a member of the Gambling and Liquor Squad since 1953. He was present at the time of the execution of the warrant for the premises at 2023 Benning Road, N. E., on September 26, 1958; and was called as a government witness to testify about the identity of certain objects that were seized at the time of the raid and the continuity of their possession to the time of the trial. On cross-examination of this witness by counsel for the petitioners he was asked whether he searched any of the persons who were arrested during the raid. He testified that he did search

some of the persons there. The following next occurred: (by petitioner's counsel)

"Q. . . . Did you search the individuals, yourself?

"A. Some I did.

"Q. Do you now know how many you searched?

"A. I couldn't tell you how many of the 18 that was searched that day that I searched, but I remember one I did search: Yancy Peterson, who pled guilty to operating a lottery earlier in this case."

Defense counsel immediately requested a bench conference, whereupon the following colloquy took place:

"The Court: You asked the question.

"Defense Counsel: My question didn't call for that answer.

"The Court: I will instruct the jury on it. Do you want to move for a mistrial?

"Defense Counsel: Yes, sir.

"The Court: I will deny it and I will instruct the jury.

. . .

"The Court: Ladies and gentlemen of the jury, the last answer of the Officer concerning Peterson will be stricken from the record and the jury is not to consider it in any way, shape or form. The jury is to put it completely from their minds. It has nothing whatever to do with this case. Would you (to counsel) like anything further?

"Defense Counsel: No, Your Honor."

The defense offered testimony out of the presence of the jury which was substantially as follows: the petitioner, Joe S. Fludd, testified that on September 26, 1958, he went to premises 2023 Benning Road, N. E., for the purpose of obtaining a coca cola; that he entered the front, that as he entered the premises to go to the coke machine an officer exhibited his badge to him and ordered him to the rear; that after he had been taken to the rear, he was searched by one of the officers; that they took Government's Exhibit number nine from his person.

The petitioner James M. Hicks testified that he went to 2023 Benning Road, N. E., on September 26, 1958; that he

went there to get a shoe shine; that when he went into the front door and stepped upon the shoe shine stand, an officer exhibited a badge to him and told him to go into the back which he did; that when he arrived in the back, he was searched and the contents of Government Exhibit number five was taken from his person.

The defense then called as a witness, Mr. Edward J. Bivens, an employee of the Department of Public Welfare for the District of Columbia, and Mr. Bivens testified: that about 3:00 or 3:30 P.M. on September 26, 1958, he was on his way home; that he had a slight headache and for that reason he stopped and went into 2023 Benning Road, N. E., for a "Seven-Up" that after he drank the Seven-Up, he started out of the premises and an officer exhibited his badge and told him to go into the back, at which time he asked "for what" and was told that "this is a raid," that he was then ushered into the back of the premises and was kept there; that he was searched and his billfold was taken and they took things out of his pocket; that he observed that there were about 30 people in the back; that the officers seemed to be taking notes and searching people and writing down different things; that after he had been taken back, other persons were brought in and searched; that all that he had on him was his identification and things like that; that notwithstanding, he was arrested, taken downtown; and, as he states "he was taken downtown, and they taken my picture and all of that."

The next witness called by the defense was Mr. George F. Carter who testified: that he had just gotten off from work and had stopped to go to a nearby place to pay for his pants at which time he decided to go to 2023 Benning Road, N. E., to get a shoe shine; that enroute he met one Joseph Wheeler and that they walked along together; that when they got to the premises they asked "where is everybody at"; that at that time they were both grabbed and were told "this is a raid" and then they were told to go

into the back room; that when they arrived there the man who arrested them stated "here are two more for you"; that at that time they were taken back where there were 20 or 25 other people and searched; that thereafter he and Wheeler were placed in a patrol wagon and taken to headquarters where they were written up, fingerprinted and then let go.

The defense then renewed the motions attacking the legality of the searches, seizures and arrests. The renewed motions were denied.

Thereafter, the Court instructed the jury. In so doing, the Court said in regard to the offense charged in Count One (violation of Section 22-1501):

> "In order to convict on this charge, the law does not require actual proof that the defendant was operating or participating in the operation of a lottery. The law provides as follows:
>
> "'The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token or other device shall be prima facie evidence that the possessor of such a copy or record did at the time and place of such possession keep, set up or promote or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting or advertising a policy lottery, policy shop, or lottery.'"
>
> "In other words, if it is shown that a defendant has numbers slips or other records, relating to a lottery in his possession, that constitutes evidence that he participated in operating the lottery, unless there is proof to the contrary.
>
> "Consequently, the jury has a right to find a verdict of guilty on a charge of operating the lottery from the fact that a person is found in possession of numbers slips or any other records of the lottery, unless the contrary is shown."

The jury returned a guilty verdict as to each of the petitioners in respect to each Count of the indictment in which they were charged. Thereafter, the Court imposed the sen-

tence against each of them of nine to twenty-seven months Count One and nine months on each of the other Counts to run concurrently with the sentence of Count one. An appeal to the United States Court of Appeals for the District of Columbia Circuit duly followed.

REASONS FOR GRANTING THIS WRIT OF CERTIORARI

ARGUMENT

1. By way of concise argument, the petitioners address themselves to each of the respective questions posed, urging each as a reason for the allowance of Writs of Certiorari. Your petitioners have not been able to find a decision from this Court that deals with the basic principle of law involved in question one. However, the principle that it is prejudicial error for the jury in a criminal case to learn of a co-defendant's plea of guilty, except when the co-defendant is called as a witness and testifies about his guilt, has been firmly established in the Third Circuit (*United States* v. *Toner*, 1949, 173 F 2d 140 and *Minder* v. *United States*, 1936, 85 F 2d 425), the Second Circuit (*United States* v. *Hall*, 1950, 178 F 2d 853) and the Eighth Circuit (*Nigro* v. *United States*, 1941, 117 F 2d 624). The District of Columbia Circuit itself has held, in two cases, that an accused has a right to be tried solely on the evidence against him rather than on the admission of another's guilt and that it was error to prejudice him in this right. *Paulton* v. *United States*, 1955, 222, F 2d 794 and *Gaumer* v. *United States*, 1957, 247 Fed. 583 F 2d.) So, it seems there is no question that the utterance of the witness, Officer Mills, at the trial below that a codefendant had pleaded guilty was prejudicial to the constitutional rights of the petitioners; and that this error standing alone was sufficient grounds for a new trial.

The trial court's admonition to the jury "not to consider it in any way shape or form" does not diminish the error. The Circuit Court of Appeals, in its written opinion (p. 3),

says that, "in light of the overwhelming evidence of guilt . . . any prejudice which may have remained despite the judge's admonition to the jury may be said to be harmless." This reasoning, even if internally consistent, ignores and diminishes the greater right of the petitioners not to have the jury's consideration tainted by improper evidence. In support of the proposition that the prejudice, if any, was harmless because of the overwhelming evidence of guilt, the Circuit Court cites three decisions from this Court: *Delli Paoli* v. *United States*, 352 U.S. 232; *Opper* v. *United States*, 348, U.S. 84; *Hopt* v. *Utah*, 120 U.S. 430. But, these three cases, do not, singlely or together, go the distance of holding that an admonition to the jury to ignore and disregard evidence that was *not admissible for any purpose* cures the prejudice caused by its admission. An admixture of "overwhelming evidence of guilt" with the unwholesome admission of improper evidence seems, to these petitioners, to be a substance that the judicial mind cannot unblend to the point of saying when one begins and the other ends.

Further, in this connection petitioners urge that the "overwhelming evidence of guilt" alluded to by the Circuit Court of Appeals is not as overwhelming as the bare reading of the Court's opinion might tend to indicate. For, it must be remembered that the said overwhelming evidence consisted of numbers slips seized from the petitioners, which seizures petitioners hereinafter attack as being unconstitutional in Point 2 of this petition. The instant case is not like many other lottery cases where the police had made many observations on the activities of the defendants and where bets had been placed with the defendants. Here, it is to be noted that as to petitioners Hicks and Fludd, the police had made no observations of them, no bets had been placed with them and they were unknown to the police as persons engaged in the lottery game.

Morover, the government's evidence of "operating a

lottery" was based on the provision of the D. C. Code (22-1501) that possession of number slips is prima facie evidence that the possessor was engaged in the operation of a lottery. This proposition is attacked by petitioners in Point 3 herein. Can it be then said that evidence of the character referred to above is so overwhelmingly conclusive of guilt as to make the error of the trial Court harmless? Petitioners submit that the answer is no.

2. The arrests of the petitioners Hicks and Fludd and the subsequent search of their persons were had in violation of their rights under the Fourth Amendment of the United States Constitution and the objects and things seized from them should have been suppressed as evidence by the trial Court. *Weeks* v. *U.S.* 232 U.S. 383. It is to be remembered that these two petitioners were arrested as they entered the basement shop at 2023 Benning Road, N. E. police officers were there in connection with the execution of a search warrant for the premises that had previously been issued by the United States Commissioner. Immediately upon arrival the officers had arrested and searched the appellant Carter who was there. They next searched the premises and found numbers material in a desk drawer, under some trash, and in a pocket of a coat that was in a chair. These seizures had been completed when the petitioners Hicks and Fludd arrived at the premises. Nevertheless, the officers arrested and searched them. *United States* v. *Di Re*, 332 U.S. 581.

As to the appellants Hicks and Fludd the search of their persons was unreasonable within the meaning of the Fourth Amendment. Since the search of their person followed their arrest it must, therefore, depend upon the validity of their arrest. There was no arrest warrant extant for either of them, nor did the officers have probable cause to believe that the petitioners Hicks and Fludd had committed any offense. *Brinegar* v. *U.S.*, 338 U.S. 160. Neither of them had been seen previously, during the time that the premises

were under observation by the police, to come and go from the place.

These two petitioners were not the only persons arrested as they entered the store. The evidence at the trial showed that at least 18 persons were arrested as they came into the building. Two of these persons testified at the trial that they had come to the building to make purchases in the store and that they were seized by the Officers, searched, taken to a Police Precinct, fingerprinted and released. The only good reason that suggests itself as to why they were released was because, unlike the petitioners, no incriminating numbers material was found on them.

The arrest of all these persons in wholesale lot, including the petitioners Hicks and Fludd, is demonstrably illegal when one considers the status of those who were arrested and subsequently released without any charge having been placed against them. The arrests of these persons were patently illegal, without justification and consequently the seizure of the petitioner's property was had in violation of the rights under the Fourth Amendment to the United States Constitution.

3. The petitioners call this Court's attention to trial Court's instruction on the part of Section 22-1501 relating to the conclusion or inference that is given to the possession of lottery materials. It is contended that this portion of the Court's instruction was erroneous because it: (a) imposed a burden on the appellants which they were not required to carry; and (b) gave the evidence a force and effect which it did not possess.

The error regarding the Court's instruction on "prima face evidence" becomes all the more consequential to the petitioners Hicks and Fludd when it is remembered that there was no evidence that any of them had been seen to come and go from the premises where they were arrested. None of them were identified as one of the persons with "bulging pockets" who was seen coming into the premises

during the course of the officer's observations. Again, none of these petitioners were known by reputation to the officer, as were others arrested and charged in this case. No bets had been placed or made with any of the petitioners prior to their arrest. The most damaging evidence against each of them was their possession of numbers material at the time of their arrest. It was thus all important that the trial judge carefully and properly instruct the jury about the effect and force of this possession as it related to Count One of the indictment.

The court's statement that "the jury had a right to find a verdict of guilty on a charge of operating the lottery from the fact that a person is found in possession of number slips or any other record of lottery, unless the contrary, is shown" gives undue force and effect to the weight of the possession of number slips. The statement omits to tell the jury that they are at liberty, if they see fit, to find a verdict of not guilty of operating a lottery on such evidence. Especially, if upon consideration of all of the evidence, and upon a further consideration of the presumption of guilt, they have a reasonable doubt as to their guilt of operating a lottery. The failure to give the jury an instruction on the matter that is evenly balanced and which informs the jury of their right to not convict on the basis of this evidence deprives the petitioners of their essential rights to due process.

It is not sufficient in meeting this contention of the petitioners to say that in other parts of the Court's charge the jury had been instructed about the presumption of innocence and about reasonable doubt. The decided cases say without equivocation that the principles of reasonable doubt and presumption of innocence must be given in connection with the presumptive evidence rule. The case of *Ward* v. *United States*, (3rd Cir., 1938) 96 F 2d 189 and *State* v. *Bryant*, 245 N. C. 645, 97 S. E. 2d 264 and cases discussed there at 97 S. E. 2d, page 266, stand for this proposition.

The trial Court's charge was erroneous for the additional reason that it had the effect of shifting the burden to the petitioners of acquitting themselves instead of upon the government to convict them. This occurred in the instant case by virtue of the Court telling the jury in effect that bare possession of "number slips or other records" was sufficient upon which to base a conviction, "unless there is proof to the contrary." This instruction violates the well settled rule of law that "it is manifest that no burden or duty is imposed on the defendant merely because a statutory rule of evidence has come into play," *State* v. *Bryant*, 97 S. E. 2d at page 266. See also: *Bulman* v. *United States*, (1938) 8 Cir., 94 F. 2d 197, 199; *Lurding* v. *United States*, (1950) 6 Cir., 179 F. 2d 419, 422; *Duncan* v. *United States* (1928) 7 Cir., 23 F. 2d 3, 4; *Gunnoe* v. *United States*, 34 F. 2d 12; *McAdams* v. *United States*, (1934) 8 Cir., 74 F. 2d 37; *Ezzard* v. *United States* (1925) 8 Cir., 7 F. 2d 808, 811.

The petitioners also urge that the full significance of the error of the Court's charge becomes clearly apparent when one considers that the Court by its instruction to the jury granted them license to convict the petioners of several distinct and independent charges on the same evidence which was, as to them, the bare possession of so-called numbers paraphernalia. It is submitted that the evidence in its total effect, if believed beyond a reasonable doubt, constituted evidence only of the violation of the possession statute which is a misdemeanor and therefore was not available as evidence in respect of the felony. Moreover, we seriously question whether evidence which relates totally to a specific count of the indictment, such as the case at bar, may be engaged as sole proof of another count in the same indictment. See *Plummer* v. *United States*, 189 F 2d 19; *Gavieres* v. *United States*, 220 U.S. 337, 58 L. Ed. 489, *Spies* v. *United States*, 317 U. S. 492, 87 L. Ed. 419; and *Berra* v. *United States*, 351 U. S. 134, 100 L. Ed. 1016.

CONCLUSION

In view of the importance of the questions here discussed to the orderly administration of the criminal law in the Federal Judicial System, it is prayed that this Court grant this petition and issue the Writ of Certiorari to review the case below.

CURTIS P. MITCHELL,
JOHN A. SHORTER, JR.
ROY M. ELLIS
Counsel for Petitioners

508 5th Street, N.W.
Washington, D. C.
MEtropolitan 8-4040

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,627

JAMES R. CARTER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 15,628

JOE S. FLUDD, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 15,629

JAMES M. HICKS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeals from the United States District Court
for the District of Columbia

Decided June 30, 1960

Mr. John A. Shorter, Jr., with whom *Mr. Curtis P. Mitchell* was on the brief, for appellants. *Mr. Marion C. George, Jr.*, also entered an appearance for appellants in Nos. 15,627 and 15,628.

Mr. Maurice R. Dunie, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, and *Carl W. Belcher*, Assistant United States Attorney, were on the brief, for appellee.

Before BAZELON, BASTIAN and BURGER, Circuit Judges.

PER CURIAM: Appellants and others not involved in these appeals, were charged with violations of the District of Columbia gambling laws. They were found guilty as charged, sentence was imposed, and these appeals followed.

The principal point raised on appeal is whether it was error for the District Court to refuse to grant a motion for mistrial where, during the course of the trial, it was brought to the attention of the jury that one of the co-defendants (one of those not involved in these appeals) had pleaded guilty to the felony count of the indictment, 22-1501 D. C. CODE, which jointly charged said co-defendant, appellants herein, and another.

The fact of the co-defendants' plea was brought to the attention of the jury in the course of defense counsel's cross examination of a government witness. This witness, a member of the Gambling and Liquor Squad, Metropolitan Police Department, participated in the arrest of the principals in this case. Upon questioning in regard to the search of certain individuals arrested, the following transpired:

> "Q. . . . Did you search the individuals, yourself?
>
> "Some I did.
>
> "Q. Do you now know how many you searched?
>
> "A. I couldn't tell you how many of the 18 that was searched that day that I searched, but I remember one I did search: Yancey Peterson, who pled guilty to operating a lottery earlier in this case."

Defense counsel immediately requested a bench conference, whereupon the following colloquy took place:

> "The Court: You asked the question.
>
> "Defense Counsel: My question didn't call for that answer.
>
> "The Court: I will instruct the jury on it. Do you want to move for a mistrial?

"Defense Counsel: Yes, sir.

"The Court: I will deny it and I will instruct the jury.

"The Court: Ladies and gentlemen of the jury, the last answer of the Officer concerning Peterson will be stricken from the record and the jury is not to consider it in any way, shape or form. The jury is to put it completely from their minds. It has nothing whatever to do with this case. Would you [to counsel] like anything further?

"Defense Counsel: No, Your Honor."

Clearly, it was unfortunate that such a statement was made. The witness was an experienced police officer with approximately seven years' assignment with the Gambling and Liquor Squad and, presumably, was not inexperienced in testifying in cases of this nature. Certainly, he should have known better. We have, of course, no way of telling whether the statement objected to was a slip of the tongue or whether it was an intended and calculated expression. If the latter, it would be inexcusable.

However, we think that, in light of the overwhelming evidence of guilt in this case, any prejudice which may have remained despite the judge's admonition to the jury may be said to be harmless. *Delli Paoli v. United States*, 352 U.S. 232 (1957); *Oppel v. United States*, 348 U.S. 84 (1954);[1] *Hopt v. Utah*, 120 U.S. 430 (1887), a capital case. That the jury was not blinded by this answer objected to is indicated by the fact that not all of the defendants were convicted.

We have examined the other contentions and find no error.

Affirmed.

[1] In *Hopt v. Utah*, 120 U.S. at page 438, the Supreme Court used the following language: "[I]ndependently of this consideration, as to the admissibility of the evidence, if it was erroneously admitted, its subsequent withdrawal from the case, with the accompanying instruction, cured the error. It is true, in some instances, there may be such strong impressions made upon the minds of a jury by illegal and improper testimony, that its subsequent withdrawal will not remove the effect caused by its admission; and in such cases the wronged defendant may avail on appeal or writ of error. But such instances are exceptional. The trial of a case is not to be suspended, the jury discharged, a new one summoned, and the evidence retaken, when an error in the admission of testimony can be corrected by its withdrawal. The presumption is that the jury will heed and disregard it. We think the present case one [illegible] [Citing cases.]"

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,627

September Term, 1959

Criminal 1126-58

JAMES R. CARTER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 15,628

September Terms, 1959

Criminal 1126-58

JOE S. FLUDD, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 15,629

September Term, 1959

Criminal 1126-58

JAMES M. HICKS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeals from the United States District Court for the District of Columbia.

Before: Bazelon, Bastian and Burger, Circuit Judges.

JUDGMENT

These appeals came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this court that the judgments of the District Court appealed from in these cases are affirmed.

Per Curiam.

Dated: June 30, 1960.

Filed June 30, 1960. Joseph W. Stewart, Clerk.